

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAUREEN A. TUMOLO,	:	CIVIL ACTION
Individually and as Executrix	:	
of the Estate of Michael D.	:	
Tumolo, Deceased	:	
	:	
	:	
	:	
v.	:	
	:	
TRIANGLE PACIFIC CORP.	:	No. 98-4213

M E M O R A N D U M

Ludwig, J.

August 23, 1999

Plaintiff Maureen A. Tumolo, executrix of the estate of Michael D. Tumolo, deceased, moves for attorney's fees of \$58,725 and costs of \$2,051.28. On May 5, 1999, in a trial by jury in an age discrimination in employment case, she received a verdict in her favor against defendant Triangle Pacific Corporation.¹

A prevailing party in an age discrimination case is entitled to "a reasonable attorney's fee to be paid by defendant, and costs of the action." 29 U.S.C. §§ 216(b), 626(b). See also 43 Pa. Const. Stat. Ann § 962. Determination of a reasonable fee is a two-step process: first, calculation of the "lodestar" - the number or hours reasonably expended, multiplied by the attorney's reasonable hourly rate; second, potential adjustment for the degree of success achieved. See

¹Plaintiff, the employee-decedent's daughter, sued under the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act. The employee died in 1997 from causes unrelated to the case. The verdict was \$65,156 in back pay and \$50,000 for emotional distress. On May 5, 1999, judgment was entered. On June 9, 1999, defendant's renewed motion for judgment as a matter of law was denied and defendant's appeal followed.

Hensley v. Echkerhart, 461 U.S. 424, 433-34, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983); Rode v. Dellarciprete, 892 F.2d 1177, 1183-84 (3d Cir. 1990). Here, defendant does not object to the hourly rates charged by plaintiff's counsel but contests the reasonableness of the hours expended and contends that the lodestar should be decreased to account for claims on which plaintiff was not successful.²

I. Number of Hours Expended

“Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary.” Rode, 892 F.2d at 1183. Also, time “spent litigating claims on which the party did not succeed and that were ‘distinct in all respects from’ claims on which the party did succeed” should be reduced. Id. (quoting Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 919 (3d Cir. 1985)). Defendant objects to the following items:

1/28/97-1/29/97	ABE ³	Reviewing and discussing with plaintiff 401(k) and pension issues	1.2 hours
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Defendant asserts that these matters were not part of the case. Plaintiff has not responded to this objection, and the connection between these entries and the litigated issues is unclear. Accordingly, the objection will be sustained.

²No objections to plaintiff's expenses of \$2,051.28 have been made.

³Primary counsel - ABE; associate - TR; paralegal - LM.

2/5/97 - 2/7/97	TR	Preparing for and attending PHRC fact-finding conference.	4.8 hours
2/8/97	ABE	Reviewing memorandum about PHRC conference	0.4 hours

Defendant argues that this conference was canceled because plaintiff's decedent was intoxicated. Plaintiff does not respond to this objection but has disputed this fact throughout the course of the litigation. See joint pretrial stip., at 11. Even so, it appears that through no fault of defendant the PHRC conference was not held. The objection will be sustained.

2/24/97, 2/25/97, 3/5/97, 11/11/97, 11/18/97, 6/19/98	TR	Prepare and review complaint	6.8 hours
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Defendant's objection will be overruled. In each disputed entry, preparation and review of the complaint was only one of several tasks listed. Fairly read, therefore, plaintiff's counsel did not bill 6.8 hours solely for work on the complaint, and the amount of time spent on all tasks listed appears to have been reasonable.

3/31/99 - 4/9/99	TR	Research and draft response to summary judgment motion.	30.8 hours
4/5/99	ABE	Review cases for response to summary judgment motion.	0.9 hours

Given that the motion for summary judgment did not raise particularly

novel or difficult legal issues, 30.8 hours researching and drafting the response brief seems excessive.⁴ Accordingly, in an exercise of discretion, the total time spent will be reduced by approximately a fourth to 23 hours.

4/12/99 - 4/13/99	ABE	Prepare amended response to summary judgment motion.	7.6 hours
4/12/99 - 4/13/99	TR	Review and revise amended response to summary judgment motion.	7.9 hours

Defendant argues that the total of 15.5 hours expended in revising the corrected response brief is unreasonable because no substantive changes were made. Plaintiff's response to defendant's motion to strike the amended response stated: "The finalized Response has no substantive changes of any kind, and only corrects typographical errors and the single miscitation to an exhibit." Pl. resp. to def. mot. to strike, ¶ 7 (April 21, 1999). The 15.5 hours for reviewing and correcting mistakes in the original brief is, therefore, excessive. The time expended by each attorney will be reduced to one and one-half hours for a total of three.

4/30/99	LM	Proofread jury charge and interrogatories	2.0 hours
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Defendant's objection will be overruled. The number of hours expended is

⁴The 0.9 hours spent by primary counsel collecting cases to submit to the court in the telephone conference of March 31, 1999 is not unreasonable and will not be reduced.

not excessive or unreasonable.

4/29/99 - 5/5/99	ABE	Prepare for and attend trial	57.9 hours
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On May 3, 1999, the trial was begun, and on May 5, the jury returned its verdict. The actual time spent on trial, including recess periods, was approximately 17 hours.⁵ During the one and one-half days of testimony, four witnesses testified in plaintiff's case-in-chief and three in defendant's case-in-chief.⁶ Trial tr., May 3 and 4, 1999. Considering the time required to prepare for voir dire, motions in limine, direct and cross-examination, opening and closing arguments, and introduction of exhibits, the remaining 40.9 hours is not excessive or unreasonable. Defendant's objection will be overruled.

5/5/99	TR	Research re: priorities (sic)	0.9 hours
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Objection sustained. It is unclear how this entry relates to the case.

II. Calculation of the Lodestar

The lodestar is presumed to be the reasonable fee. Rode, 892 F.2d at 1183 (citation omitted). Here, the lodestar, after the above adjustments, is as follows:

⁵The Clerk's office minute sheets state that the trial occurred on May 3, 1999 from 10:00 a.m. to 4:45 p.m.; May 4, 1999 from 9:30 a.m. to 3:00 p.m.; and May 5, 1999 from 9:30 a.m. to 2:00 p.m.

⁶Three of the same witnesses testified both in plaintiff's and defendant's cases-in-chief.

Primary Counsel (ABE): 115.6 hours x \$300/hr = \$34,680

Associate Counsel (TR): 75.7 hours x \$225/hr = \$17,032.50

Paralegal (LM): 3 hours x \$75/hr = \$225

Total Lodestar = \$51,937.50

III. Reduction for Unsuccessful Claims⁷

A lodestar may be adjusted to conform with the results obtained. Rode, 892 F.2d at 1183. “The party seeking adjustment has the burden of proving that an adjustment is necessary.” Id. (citing Cunningham v. McKeesport, 753 F.2d 262, 268 (3d Cir. 1985)).

The lodestar may be adjusted downward to “account[] for time spent litigating wholly or partially unsuccessful claims that are related to the litigation of the successful claims.” Rode, 892 F.2d at 1183. However, “when . . . a litigant prevails on only a subset of a group of related claims, the fee award should be reduced if and only if the party did not receive full relief.” Bell v. United Princeton Properties, Inc., 884 F.2d 713, 725 (3d Cir. 1989).

Here, the complaint asserted several theories of age-based discrimination. Defendant was granted summary judgment as to claims of hostile working environment, disparate pay, retaliation, and punitive damages. Order, April 21, 1999. The claim of discriminatory discharge was tried and plaintiff was awarded a total of \$165,156 in compensatory damages. As defendant is well aware, this

⁷Plaintiff does not request an increase in the lodestar.

was a very good result for plaintiff. Although plaintiff did obtain full relief at trial,⁸ a minimal reduction is warranted to reflect time spent litigating the unsuccessful theories and plaintiff's non-recovery of punitive or liquidated damages. Accordingly, the lodestar will be reduced by 10 percent for a total of \$46,743.75 as a fee award.⁹

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⁸Defendant's argument that the attorney's fee should be reduced because plaintiff did not receive the full \$71,042.12 back-pay requested at trial is not well taken. Fees should not be reduced to maintain a proportionate ratio with the damages awarded - but only to reflect a limited degree of success obtained. Washington v. Philadelphia County Ct. of Common Pleas, 89 F.3d 1031, 1042 (3d Cir. 1996). Here, the \$5,886.12 disparity in back-pay does not detract from plaintiff's overall success at trial.

⁹Further reduction based on these unsuccessful claims is unwarranted. The primary allegation of discrimination was the termination of plaintiff's decedent, on which plaintiff was successful at trial. Mem., April 22, 1999, at 7 ("At the heart of this case is the claim of discriminatory discharge."). Plaintiff's brief in response to summary judgment was almost entirely directed to this claim. As noted in the summary judgment memorandum opinion, it was not even clear if plaintiff was asserting a hostile work environment claim and plaintiff spent little time or effort litigating such a claim. Id., at 2. Moreover, defendant concedes that the retaliation claim is "too parallel . . . to be considered 'distinct'." Def. mem., at 4 n.1.

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ORDER

AND NOW, this 23rd day of August, 1999, the petition for attorney's fees of plaintiff Maureen A. Tumolo, executrix of the estate of Michael D. Tumolo, deceased, is granted in part and denied in part.

Attorney's fees award	-	<u>\$46,743.75</u>
Costs	-	<u>\$ 2,051.28</u>
Total	=	<u>\$48,795.03</u>

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